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No. 01-1640

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHASTA COUNTY, a public entity; BRAD McDANNOLD, an individual; and D. COMPOMIZZO, an individual,

Petitioners,

v.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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I. INTEREST OF AMICUS CURIAE.[1]

Amicus Curiae is the California State Sheriffs' Association ("CSSA"), which is an association representing every elected sheriff of all of the 58 counties of the State of California. The CSSA is familiar with the questions of law and fact involved in this case, and how the resolution of the questions presented to the Ninth Circuit Court of Appeals below directly affects the very nature and character of the office of Sheriff in the State of California.

II. SUMMARY OF THE ARGUMENT.

Amicus Curiae, the membership of whom have countless combined years of experience in law enforcement, respectfully submits to the Court that the Ninth Circuit's opinion in this matter is directly contrary to the law as stated by this Court in *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997), and contrary to California law. *McMillian* requires the Ninth Circuit to use California law to determine whether a county officer is acting on behalf of the county or the state in particular actions, for purposes of determining liability pursuant to 42 U.S.C. § 1983. The Ninth Circuit did not consider or did not properly consider California law.

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[1] No counsel for any party authored this brief in whole or in part. No other person, entity or its members, or their counsel, other than CSSA made any monetary contribution to the preparation or submission of this brief. CSSA has received written consent from Rolland Papendick and oral consent from David Prentice, attorney for Respondent, and Scott Davenport, attorney for Petitioner, for the filing of this brief.

The Supreme Court has characterized the office of Sheriff as part of the State Executive Department. The California Constitution requires the State Legislature to provide for an elected county sheriff. The Constitution also provides that the Attorney General directly supervises sheriffs. Moreover, the County Board of Supervisors has limited fiscal authority over the office of Sheriff and may not interfere with the investigative and prosecutorial functions of the office of Sheriff. The duties of the office of Sheriff are prescribed by State statute and the Sheriff enforces state policy as set forth in state law, particularly the California Penal Code. Therefore, the CSSA respectfully urges this Court to grant the Petition for Writ of Certiorari in this matter, as there is compelling reason to do so. California Supreme Court Rule 10(c).

III. THE NINTH CIRCUIT COURT OF APPEALS HAS ISSUED AN OPINION THAT IS IN CONFLICT WITH THIS COURT'S DECISION IN *MCMILLIAN*, AND CERTIORARI, THEREFORE SHOULD BE GRANTED.

Amicus Curiae respectfully requests that the California Supreme Court grant the Petition for Writ of Certiorari in this matter to review the Ninth Circuit Court of Appeals decision in *Shasta County v. Brewster*, 275 F.3d 803 (9th Cir. 2001). There are compelling reasons for granting the requested Writ. The Ninth Circuit Court of Appeals has decided an aspect of important California law relating to an important federal question in a way that conflicts with relevant decisions of this Court, namely *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997), and California law. Supreme Court Rule 10(c).

The Ninth Circuit Court of Appeals determined that the Shasta County Sheriff's Department can be held liable for a violation of civil rights, pursuant to 42 U.S.C. § 1983, because the Sheriff is a *county* officer and not a *state* officer, according to the Court's interpretation of California law. The Ninth Circuit Court of Appeals ignored or improperly discounted critical California law, contrary to *McMillian*, in so concluding, however.

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), this Court held that local governments, including counties, are liable under Section 1983 for their official policies. *McMillian*, at 784, 117 S. Ct. at 1736, 138 L. Ed. 2d at 7 (citing *Monell*, at 694, 56 L. Ed. 2d at 638, 98 S. Ct. at 2037). If the county officials are acting on behalf of the state rather than the county, however, then no liability attaches, as the state is immune from liability under Section 1983. The critical analysis, therefore, in this matter is whether the Shasta County Sheriff's Department is acting as a state or county agency in investigating and enforcing state criminal laws.

The California Supreme Court, although in dicta, specifically determined, over 130 years ago, that "the Sheriffs, Recorders, etc., in the several county organizations, are also members of the [State] Executive Department." *Harpending v. Haight*, 39 Cal. 189, 213 (1870). Similarly in *McMillian*, this Court focused on the fact that the Alabama Constitution specifically provided that Sheriffs were part of the state executive department. *McMillian*, at 787, 117 S. Ct. at 1738, 138 L. Ed. 2d at 9 (quoting Ala. Const. of 1901, Art. V, § 112). The Ninth Circuit did not consider this aspect of California law, articulated by the State's highest court. In fact, the Ninth

Circuit focused only on the fact that such statement is *not* contained in the California *Constitution*, pointing out that the Constitution instead "identifies the sheriff as a county officer." *Brewster*, 275 F.3d at 807. The Constitution actually requires that the State Legislature "*provide for*" an elected county sheriff. Cal. Const. art. XI, § 1 (emphasis added). It is actually the California *Code* which provides that the sheriff is a county officer. Cal. Govt. Code § 24000. Neither of these provisions, however, preclude the characterization of California Sheriffs as acting on behalf of the State in certain aspects of their duties. This is true especially in light of the fact that, based on identical Constitutional language in the same provision, the California Supreme Court has held that District Attorneys are acting on behalf of the State in their prosecutorial function. Cal. Const. art. XI, § 1 (the Legislature is required to provide for an elected District Attorney); *Pitts v. County of Kern*, 17 Cal. 4th 340, 70 Cal. Rptr. 2d 823, 949 P.2d 920 (1998) (holding District Attorney acting on behalf of State when prosecuting).

It is clear from the legislative history of the Constitutional provision, quoted above and relating to Sheriffs, that the People of the State of California intended to provide for an elected Sheriff, independent of the county in certain respects. The voters were informed in the ballot materials, provided for consideration in passing this particular provision of the Constitution, that "sheriffs require a degree of independence free from undue political influence" and that the proposed Constitutional provision would make "the sheriff directly accountable to the people." Ballot Materials for Constitutional Amendment to Article XI, §§ 1(b) & 4(c), Argument in favor of Proposition 6, *available in* University of California, Hastings

California Ballot Propositions Database <http://www.uchastings.edu/library/ballotprops.htm>.

The voters were further informed, in relation to a later amendment to the same provision, that "an election of the county sheriff and district attorney makes sense for two reasons: (1) the law grants considerable discretion to these local law enforcement officials, and (2) they may be called upon to investigate or prosecute members of the county board of supervisors." Ballot Materials for Constitutional Amendment to Article XI, §§ 1(b) & 4(c), Argument in favor of Proposition 66, *available in* University of California, Hastings California Ballot Propositions Database <http://www.uchastings.edu/library/ballotprops.htm>. The Ninth Circuit nullified this critical intent, supporting the Constitutional provision at issue here, by stating that "[t]he provision thus is akin to a separation of powers provision," and concluded that "[m]erely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act for the county." *Brewster*, 275 F.3d at 810. The opposite is equally true, however. Simply because the Sheriff is a county official, situated in a particular geographical region and paid by the County, does not mean that he or she cannot act for the State in investigating and enforcing State law. *Pitts*, at 355-56, 949 P.2d 920, 930, 70 Cal. Rptr. 2d 823 (noting that "district attorneys and state judges are often considered state officials, even though they too have limited jurisdictions and are elected locally") (internal quotations omitted) (quoting *McMillian*, at 791, 117 S. Ct. at 1740, 138 L. Ed. 2d at 11-12); *McMillian*, at 791, 117 S. Ct. at 1740, 138 L. Ed. 2d at 11-12 (noting that the county paid the sheriff, but finding only indirect control by the county of the sheriff). The Sheriff, after all,

is enforcing *State* policy, as that policy is determined in the California Penal Code in particular, when he or she investigates State crimes and effectuates arrests pursuant to violations of State law. As noted by the California Court of Appeal and equally applicable to Sheriffs, "it is difficult to imagine how a district attorney's enforcement of *state law* could be characterized as creating local policy." *Pitts*, 17 Cal. 4th at 360, 70 Cal. Rptr. 2d at 933, 949 P.2d 920 (1998) (emphasis added) (citing *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) ("'Clearly, state criminal laws . . . represent the policy of the state.'")).

This Court further noted that as part of the Alabama executive department, such Sheriffs "have to take the constitutional oath of office, and are required to submit written reports to the governor on demand." *Id.* at 787 n.5, 117 S. Ct. at 1738 n.5, 138 L. Ed. 2d at 9 n.5 (citing Ala. Const. of 1901, Art. XVII, § 279 & Ala. Const. of 1875, Art. XV, § 1). Similarly, California law provides that the Attorney General can require written reports from Sheriffs relating to the investigation, detection and punishment of crime. Cal. Govt. Code § 12560. The Ninth Circuit Court of Appeals noted this provision, but did not give weight to this factor in favor of California Sheriffs acting on behalf of the State, contrary to this Court's opinion in *McMillian. Brewster*, 275 F.3d at 809. California law also provides that Sheriffs must take a constitutional oath of office. Cal. Const. art. XX, § 3 ("all public officers . . . shall, before they enter upon the duties of their respective offices, take and subscribe the following oath," with public officer explicitly including, among others, every officer of the State and every county). The Ninth Circuit failed to consider this factor.

In the Ninth Circuit's opinion in this matter, it focuses on the fact that county Sheriffs in Alabama were subject to impeachment, while California Sheriffs are subject to county grand jury indictment, although the Ninth Circuit did recognize that "this factor may be of somewhat limited weight because a state court appoints the prosecutor to conduct impeachment proceedings." *Brewster*, 275 F.3d at 808. This Court's discussion of the fact that Alabama Sheriffs were subject to impeachment, however, is not an absolute indication of whether Sheriffs are acting on behalf of the state or the county.

Instead, this Court used that factor to point out the framers' intent to put authority for the removal of Sheriffs with the Governor in an effort to end mob lynchings in which the Sheriffs were passively participating. While the Ninth Circuit rightly recognized that such historical background is not present in California, the absence of such history does not render California's determination that its Sheriffs act on behalf of the State, in at least some capacities, meaningless.

In particular, the California Court of Appeal, in considering the office of the Sheriff, analyzed ballot materials relating to the adoption of the Constitutional provisions regarding the Sheriff, and noted that the materials emphasized that "sheriffs have broad powers and responsibilities enumerated in virtually *all* of the California *[state] codes*, one of the most awesome of these responsibilities being a mandate to take appropriate action when there is a breakdown of law enforcement at the *local* level in a municipality." *Beck v. County of Santa Clara*, 204 Cal. App. 3d 789, 799, 251 Cal. Rptr. 444, 449 (1988). This responsibility is reflective of a Sheriff acting on behalf of the *State*, especially in light of the fact that

"[t]he State is divided into counties which are legal subdivisions of the State." Cal. Const. art. XI, § 1(a). *See also, Younger v. Board of Supervisors of San Diego County*, 93 Cal. App. 3d 864, 870, 155 Cal. Rptr. 921, 924-25 (1979) ("Since counties constitute merely political subdivisions of the state, they have independently only such legislative authority that has been expressly conferred by the *Constitution* and *laws* of the *state*. If the latter sources are silent in regard to the delegation of such authority, the authority must still rest with the Legislature.") (citing Cal. Const., art. XI, § 1(a); *Hicks v. Board of Supervisors*, 69 Cal. App. 3d 228, 242, 138 Cal. Rptr. 101 (1977); *Byers v. Board of Supervisors*, 262 Cal. App. 2d 148, 155, 68 Cal. Rptr. 549 (1968); *Simpson v. Payne*, 79 Cal. App. 780, 785-786, 251 P. 324 (1926)). The California Court of Appeal has also emphasized that the Constitution "does not specify any of [the Sheriff's] duties; instead they are specified in great detail in a large body of *[state] statutory* law." *Beck*, at 796, 251 Cal. Rptr. at 447 (1988) (emphasis added) (citing Cal. Penal Code § 4000 et seq.; Cal. Govt. Code § 26600 et seq.; and Cal. Govt. Code § 23013).

Moreover, the Ninth Circuit's reliance on this factor has little significance when considered in light of the fact that District Attorneys are similarly subject to grand jury indictment rather than impeachment, but have definitively been determined by the California Supreme Court to be acting on behalf of the State. Cal. Govt. Code §§ 3060 ("An accusation in writing against any officer of a district, county, or city, . . . , for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.") & 24000 (District Attorney is county officer); *Pitts v. County of Kern*, 17 Cal. 4th 340, 70 Cal. Rptr. 2d 823, 949 P.2d 920

(1998) (District Attorney acts on behalf of State in prosecuting crimes).

One other critical aspect of California law relating to the office of Sheriff was considered and dismissed by the Ninth Circuit. The California Government Code requires the board of supervisors to "supervise the official conduct of all county officers" with a focus in particular on the extent to which their official "functions and duties... relate to the assessing, collecting, safekeeping, management, or disbursement of public *funds*." Cal. Govt. Code § 25303 (emphasis added). This section also specifically provides, however, as follows:

> This section shall not be construed to affect the *independent* and *constitutionally* and *statutorily* designated *investigative* and prosecutorial functions of the *sheriff* and district attorney of a county. The board of supervisors shall not obstruct the *investigative* function of the *sheriff* of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

Id. See also, Cal. Const. art. V, § 13 (powers of Attorney General, including supervision of Sheriffs). The California Court of Appeal specifically determined that "because the sheriff, as stated, is a *constitutional* officer, his duties are of *statewide* importance, a fact further cemented by the existence of myriad *[state] statutes* regulating his duties." *Beck v. County of Santa Clara*, 204 Cal. App. 3d 789, 800, 251 Cal. Rptr. 444 (1988) (emphasis added) The California Constitution also specifically provides that the State Attorney General is "the chief law officer of the State" and has the duty "to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V,

§ 13. The Attorney General also specifically has "*direct supervision* over every district attorney *and* sheriff . . . , in *all* matters pertaining to the *duties* of their respective offices." *Id.* (emphasis added).

Once again, the Ninth Circuit refused to give weight to these provisions of State law governing the characterization of the office of Sheriff in the State of California. The Ninth Circuit acknowledged that the provisions relating to the supervision of Sheriffs and District Attorneys by the Attorney General are similar, but points out that the Attorney General is authorized to actually prosecute law in any county where such laws are not being adequately enforced, and is further specifically authorized to have all the powers of the District Attorney. *Brewster*, 275 F.3d at 810. The Ninth Circuit erroneously points out that "[n]o similar provision permits the Attorney General to assume the powers of a sheriff." *Id.* In fact, the Attorney General does have the statutory authority to, "[w]henever he deems it necessary in the public interest, . . . appoint some *competent*[2] person to perform the duties of sheriff with respect to the investigation or detection of a particular crime and cause the arrest of persons in connection therewith. Any person so appointed has all the powers of a sheriff with respect to the particular matter." Cal. Govt. Code § 12561 (emphasis added). *See also* Cal. Govt. Code § 12650 ("Whenever he deems it necessary in the public interest [the Attorney General] shall *direct the activities* of

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[2] The fact that the Attorney General him or herself is not authorized to actually assume those duties may be more a function of competence and expertise in executing the duties of the office of sheriff, rather than an indication that the Attorney General does not have actual supervisory authority over such county officer acting on behalf of the State.

any *sheriff* relative to the *investigation* or *detection* of crime within the jurisdiction of the sheriff, and he may direct the service of subpenas, warrants of arrest, or other processes of court in connection therewith.") (emphasis added).

Perhaps most importantly, the California Court of Appeal specifically held that "in establishing policies for the release of persons from a county jail, a sheriff acts as a *state* official, not a policy maker for the county." *County of Los Angeles v. Superior Court of Los Angeles County (Peters)*, 68 Cal. App. 4th 1166, 80 Cal. Rptr. 2d 860 (1998) (emphasis added). The Ninth Circuit too easily discarded this statement of California law. First, the Ninth Circuit simply stated that it was "not bound by the determination of the California Court of Appeal in *Peters* that California sheriffs are state actors," asserting that "[q]uestions regarding section 1983 liability implicate *federal*, not *state*, law." *Brewster*, 275 F.3d at 811 (emphasis added). This is in direct conflict with the statement of this Court in *McMillian* that the analysis of whether the Sheriff acts on behalf of the county or the state "is dependent on an analysis of state law." *McMillian*, at 785, 117 S. Ct. at 1737, 138 L. Ed. 2d at 8.

Of course this Court qualified this statement regarding a dependence on state law when it also stated that "[t]his is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." *Id.* This statement, however, should not have been interpreted by the Ninth Circuit as a license to so easily disregard statements by the California courts about whether Sheriffs act on behalf of the state or county. The Ninth Circuit Court, after all, is required to regard "[t]he laws of the several

states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, ... as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. This is true even of appellate court opinions on matters of state law. As this Court has stated, "[w]here an intermediate appellate state court rests its *considered judgment* upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the *highest court of the state* would decide otherwise." *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183, 85 L. Ed. 139, 144 (1940) (emphasis added).

Without even really evaluating the law carefully considered by the California Court of Appeal in *Peters*, however, including, as applied by the *Peters* Court, the California *Supreme Court's* analysis of the same issue relating to District Attorneys in *Pitts*, the Ninth Circuit Court of Appeals summarily dismissed this clear statement of California law. *Brewster*, 275 F.3d at 811. In fact, the Ninth Circuit specifically stated that it was satisfied that California case law supported its conclusion regarding the role of California Sheriffs, without specifically determining that the California Supreme Court's decision would be the same. The Ninth Circuit flatly refused to follow the one case directly addressing the issue, the California Court of Appeal opinion in *Peters*, which analyzed identical provisions of California law relating to Sheriffs as were relied upon by the California Supreme Court relating to District Attorneys in *Pitts*.

The critical dilemma created by the Ninth Circuit's evaluation is the discrepancy in an interpretation of *State*

law. Litigants bringing actions against counties in the State of California can do so pursuant to 42 U.S.C. § 1983 in either state or federal court. The results in each court will be contrary, depending upon whether the court is a state trial court, bound to follow *Peters* or a federal district court, constrained by the holding in *Brewster*.

The Ninth Circuit Court of Appeals has clearly departed from this Court's statement of law in *McMillian*. This Court determined in *McMillian* that a court must evaluate Section 1983 liability for a county based upon *state law*, regarding whether the actions are on behalf of the county or the state. Analysis of the California Constitution, its historical background, and the California Supreme and Appellate Court opinions show, in relating to the office of Sheriff, an independence from the County, a clear intent to create a *constitutional* officer for the county, which is a subdivision of the *State*, and supervision by the Attorney General. The Ninth Circuit Court of Appeals simply did not consider some of this law and did not adequately consider the remainder, in light of the Supreme Court's analysis of an almost identical issue in *Pitts*. The Sheriffs' duties are set out by the State Legislature. The County Board of Supervisors is given only limited fiscal control over the office of the Sheriff and such power is specifically limited to the extent that it would affect the "independent constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff." Cal. Govt. Code § 25303; Cal. Const. art. V, § 13.

IV. CONCLUSION.

This Court in *McMillian* specifically stated that state law determines whether a county officer is acting on

behalf of the county or the state for purposes of liability pursuant to 42 U.S.C. § 1983. The Ninth Circuit did not consider the California Court of Appeal opinion in *County of Los Angeles v. Superior Ct. of Los Angeles County (Peters)*, 68 Cal. App. 4th 1166, 80 Cal. Rptr. 2d 860 (1998), regarding whether a Sheriff acts on behalf of the county or State, even though the *Peters* opinion systematically applied the California Supreme Court's analysis in *Pitts v. County of Kern*, 17 Cal. 4th 340, 70 Cal. Rptr. 2d 823, 949 P.2d 920 (1998), regarding the present legal issue but relating to the office of District Attorney. The Ninth Circuit Court of Appeals opinion in *Brewster*, therefore, is contrary to California law, as interpreted by California Courts and is also contrary to this Court's analysis and holding in *McMillian*. For all of the foregoing reasons, this Court is respectfully requested to grant the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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